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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH JEROME ANDERSON,

Defendant and Appellant.

D069897

(Super. Ct. No. SCD114427)

APPEAL from an order of the Superior Court of San Diego County, David J.

Danielsen, Judge. Affirmed.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

I

INTRODUCTION

Kenneth Jerome Anderson appeals from an order resentencing him for two counts under Penal Code section 1170.126.¹ Anderson's court-appointed counsel filed a brief

¹ Penal Code section 1170.126 was enacted as part of the Three Strikes Reform Act of 2012. (*People v. Osuna* (2014) 225 Cal.App.4th, 1020, 1026 (*Osuna*).) Among its provisions, "[t]he Act ... created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law [(Pen. Code, §§ 667, subd. (b)-(i), 1170.12)] for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety.' " (*Osuna, supra*, at p. 1026.)

As relevant to this appeal, Penal Code section 1170.126 provides: "(a) The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence.

"(b) Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section.

"(c) No person who is presently serving a term of imprisonment for a "second strike" conviction imposed pursuant to paragraph (1) of subdivision (e) of Section 667 or paragraph (1) of subdivision (c) of Section 1170.12, shall be eligible for resentencing under the provisions of this section. [¶] . . . [¶]

"(e) An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7. [¶] (2) The inmate's current

under *People v. Wende* (1979) 25 Cal.3d 436, 441–442 (*Wende*) requesting we independently review the record for error. Having done so and having identified no reasonably arguable appellate issues, we affirm the order.

II

BACKGROUND²

A jury convicted Anderson of possessing cocaine base for sale (Health & Saf. Code, § 11351.5; count 1), possession of a firearm by a felon (former Pen. Code,

sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. [¶] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.

"(f) Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e). If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.

"(g) In exercising its discretion in subdivision (f), the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety."

² We omit a summary of the facts underlying Anderson's convictions because the facts are not relevant to this appeal. We base part of our summary on our prior decision in *People v. Anderson* (July 16, 2015, D065338) [nonpub. opn.] [2015 Cal.App. Unpub. LEXIS 4944] (*Anderson*), of which we take judicial notice (Evid. Code, §§ 452, subd. (c), 459, subd. (a)).

§ 12021, subd. (a), now Pen. Code, § 29800, subd. (a); count 2), and two counts of selling or furnishing cocaine base (Health & Saf. Code, § 11352, subd. (a); counts 4 & 5).³ The jury also found true an allegation Anderson was armed with a firearm during the commission of a crime charged in count 1 (Pen. Code, § 12022, subd. (c)). (*Anderson, supra*, 2015 Cal.App. Unpub. LEXIS 4944, at pp. *3–4 & fn. 3.) The court separately found Anderson had two prior strike convictions (Pen. Code, §§ 667, subds. (b)–(i), 1170.12) and had previously been convicted of a drug offense (Health & Saf. Code, §§ 11351.5, 11370.2, subd. (a)). (*Anderson*, at p. *3.)

The court sentenced Anderson to an aggregate term of 81 years to life in prison. The sentence consisted of consecutive determinate terms of three years each for the prior drug offense enhancement and the firearm enhancement attendant to count 1 plus three consecutive indeterminate terms of 25 years to life under the three strikes law for counts 1, 4 and 5.⁴ (*Anderson, supra*, 2015 Cal.App. Unpub. LEXIS 4944, at pp. *3–5.)

Anderson filed a petition seeking resentencing under Penal Code section 1170.126 for counts 4 and 5. (*Anderson, supra*, 2015 Cal. App. Unpub. LEXIS 4944, at p. *5.) The court denied the petition, finding Anderson was categorically ineligible for resentencing because he had possessed a firearm during the commission of count 1. (*Id.*

³ The jury could not reach a verdict on a charge Anderson possessed a firearm while possessing a controlled substance (Health & Saf. Code, § 11370.1, subd. (a); count 3) and the court subsequently dismissed the charge. (*Anderson, supra*, 2015 Cal.App. Unpub. LEXIS 4944, at p. *3.)

⁴ The court imposed but stayed under Penal Code section 654 an indeterminate term of 25 years to life for count 2. (*Anderson, supra*, 2015 Cal.App. Unpub. LEXIS 4944, at p. *5, fn. 4.)

at pp. *5–6.) We reversed the court's ruling and remanded the matter for a new hearing on the petition, finding Anderson was eligible for resentencing on counts 4 and 5 provided he satisfied the three criteria in section 1170.126, subdivision (e) (see fn. 1, *ante*). (*Anderson*, at pp. *6–7.)

Upon remand, the parties agreed the court should grant the petition and resentence Anderson. The court ordered the sentences for counts 1 and 2 to remain as originally imposed. As to count 4, the court sentenced Anderson to the middle term of four years, doubled to eight years for the prior strike conviction findings. As to count 5, the court sentenced Anderson to a consecutive term of two years and eight months (or one-third of the middle term of four years) for an aggregate sentence of 41 years and eight months to life.

The resentencing order included orders indicating Anderson's custody credits were unchanged and imposing, but staying, a parole revocation fine (Pen. Code, § 1202.45) in the same amount as the restitution fine. Anderson filed a motion for correction of the abstract of judgment because the statute the court relied upon to impose the parole revocation fine did not become effective until three weeks after Anderson's most recent offenses. The court corrected the error and filed an amended abstract of judgment reflecting the deletion of the parole revocation fine.

The amended abstract of judgment, however, did not reflect the award of any credit for actual custody or any conduct credit for the period between Anderson's arrest and the date of his initial sentencing. The amended abstract of judgment also erroneously listed the date of sentencing as December 9, 1996, instead of the date the court

resentenced him. Anderson filed a motion under Penal Code section 1237.1 seeking correction of his custody credits. The court subsequently issued another amended abstract of judgment correcting the award of presentence custody credits and the sentencing date.

III

DISCUSSION

Appointed appellate counsel filed a brief summarizing the facts and proceedings below. Counsel presented no argument for reversal and instead requested we independently review the record for error as mandated by *Wende, supra*, 25 Cal.3d at pages 441–442. To aid our review, and consistent with *Anders v. California* (1967) 386 U.S. 738, 744, counsel identified one possible appellate issue (*Anders* issue): whether the court erred by finding appellate ineligible for resentencing on count 1 due to the jury's finding that Anderson was armed during the commission of the offense.⁵ (Contra, *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030–1032 [Pen. Code, § 1170.126 does not permit a person to be resentenced for an offense if the person was armed during the commission of the offense].)

Additionally, we granted Anderson permission to file a supplemental brief on his own behalf. He has not done so.

We have conducted the requested independent review of the record, including considering the *Anders* issue identified by appointed appellate counsel. Our review did

⁵ Anderson conceded in the prior appeal he was not eligible for resentencing on count 1 for this reason. (*Anderson, supra*, 2015 Cal.App. Unpub. 4944, at p. *6.)

not disclose any reasonably arguable appellate issues. Anderson has been competently represented by counsel in this appeal.

IV

DISPOSITION

The order is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

IRION, J.